

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

<p>TERRANCE J. O'CONNOR,</p> <p>Plaintiff,</p> <p>v.</p> <p>JO ANNE B. BARNHART,</p> <p>Commissioner of Social</p> <p>Security,</p> <p>Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>No. 05-CV-0064-AAM</p> <p>ORDER DENYING PLAINTIFF'S</p> <p>MOTION FOR SUMMARY JUDGMENT</p> <p>AND GRANTING DEFENDANT'S</p> <p>MOTION FOR SUMMARY JUDGMENT,</p> <p><i>INTER ALIA</i></p>
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BEFORE THE COURT are cross motions for Summary Judgment. (Ct. Rec. 12, 15). Attorney Lora Lee Stover represents Terrance O'Connor (Plaintiff); Assistant United States Attorney Pamela DeRusha and Special Assistant United States Attorney Richard A. Morris represent the Defendant. After reviewing the administrative record and pleadings filed by the parties, the court **DENIES** Plaintiff's motion for summary judgment and **GRANTS** Defendant's motion for summary judgment.

**I. JURISDICTION**

Mr. O'Connor protectively filed for Disability Insurance Benefits (DIB) and Social Security Income (SSI) on July 29, 2002. (Tr. 68-70, 655-58.) He alleged disability due to bipolar disorder and post traumatic stress disorder (PTSD) with an onset date of June 1999. (Tr. 83.) Plaintiff's applications were

1 denied initially and upon reconsideration. (Tr. 38, 44.) He  
2 timely requested a hearing before an administrative law judge  
3 (ALJ), which was held on January 7, 2004. (Tr. 48, 665-96.) ALJ  
4 John Hood denied his application on April 20, 2004, and the  
5 Appeals Council denied review, making the ALJ's decision the final  
6 decision of the Commissioner. (Tr. 5, 26-30.) The instant  
7 matter is before the district court pursuant to 42 U.S.C. §  
8 405(g).

## 9 II. SEQUENTIAL EVALUATION

10 The Social Security Act defines disability as the "inability  
11 to engage in any substantial gainful activity by reason of any  
12 medically determinable physical or mental impairment which can be  
13 expected to result in death or which has lasted or can be expected  
14 to last for a continuous period of not less than twelve months."  
15 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides  
16 that a claimant shall be determined to be under a disability only  
17 if his impairments are of such severity that the claimant is not  
18 only unable to do his previous work but cannot, considering  
19 claimant's age, education and work experiences, engage in any  
20 other substantial gainful work which exists in the national  
21 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

22 The Commissioner has established a five-step sequential  
23 evaluation process for determining whether a person is disabled.  
24 20 C.F.R. §§ 404.1520, 416.920; *Bowen v. Yuckert*, 482 U.S. 137,  
25 140-42 (1987).

26 *Step 1:* Is the claimant engaged in substantial gainful  
27 activities? 20 C.F.R. §§ 404.1520(a)(4)(I),  
28 416.920(a)(4)(I). If he is, benefits are denied. If he  
is not, the decision maker proceeds to step two.

1 Step 2: Does the claimant have a medically severe  
2 impairment or combination of impairments? 20 C.F.R. §§  
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii)). If the claimant  
4 does not have a severe impairment or combination of  
5 impairments, the disability claim is denied. If the  
6 impairment is severe, the evaluation proceeds to the  
7 third step.

8 Step 3: Does the claimant's impairment meet or equal  
9 one of the listed impairments acknowledged by the  
10 Commissioner to be so severe as to preclude substantial  
11 gainful activity? 20 C.F.R. §§ 404.1520(a)(4)(iii),  
12 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P, App. 1.  
13 If the impairment meets or equals one of the listed  
14 impairments, the claimant is conclusively presumed to be  
15 disabled. If the impairment is not one conclusively  
16 presumed to be disabling, the evaluation proceeds to the  
17 fourth step.

18 Step 4: Does the impairment prevent the claimant from  
19 performing work he has performed in the past? 20 C.F.R.  
20 §§404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step,  
21 the claimant's residual functional capacity assessment  
22 is considered. If the claimant is able to perform his  
23 previous work, he is not disabled. If the claimant  
24 cannot perform his previous work, then the evaluation  
25 proceeds to the fifth and final step.

26 Step 5: Is the claimant able to perform other work in  
27 the national economy in view of his age, education, work  
28 experience and residual functional capacity? 20 C.F.R.  
§§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

The initial burden of proof rests upon the claimant to  
establish a prima facie case of entitlement to disability  
benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971).  
This burden is met once a claimant establishes that a physical or  
mental impairment prevents him from engaging in his previous  
occupation. At step five, the burden shifts to the Commissioner  
to show that (1) the claimant can perform other substantial  
gainful activity; and (2) a "significant number of jobs exist in  
the national economy" which claimant can perform. *Kail v.*  
*Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

### III. STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001) the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social. Sec. Admin.*, 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2000).

### IV. STATEMENT OF THE CASE

Detailed facts of the case are set forth in the transcript of proceedings and the parties' pleadings and are briefly summarized here. Plaintiff was 55 years old at the time of the ALJ hearing. (Tr. 676.) He has a high school education and has worked as a taper and dry wall installer, a janitor, general maintenance worker, painter and roofer (Tr. 92, 688.) He was not married and reported no children, although there were references in the record to a son with whom he had no contact. (Tr.640.) Plaintiff has a long history of substance abuse. He reported he has used drugs for the last 35 years, including methamphetamine, marijuana, and cocaine. He reported he lived in a "crack house" for twelve

1 years. (Tr. 640.) He was in chemical dependency treatment at the  
2 time of the hearing with YFA Connections (YFA), where he had been  
3 going since March 2002. (Tr. 641, 685.) He testified that he  
4 lived alone in an apartment and was able to attend to his personal  
5 needs. He stated he did his own household chores and shopping and  
6 attended substance abuse treatment meetings three times a week.  
7 (Tr. 684.) He stated he was also working part-time in his  
8 apartment building, doing yard work and general maintenance for  
9 his landlord. (Tr. 683-84.) He testified he could not work due  
10 to being partially blind in one eye, sleep deprivation and bipolar  
11 symptoms. (Tr. 680-81.)

#### 12 V. ADMINISTRATIVE DECISION

13 At step one, ALJ Hood found Plaintiff had not engaged in  
14 substantial gainful activity since his alleged onset date; at step  
15 two and three, he found Plaintiff had the "severe" impairment of  
16 drug and alcohol abuse which met the criteria of section 12.04 A  
17 and B of the listed impairments of Appendix 1, Subpart P,  
18 Regulation No. 4. (Tr. 29.) The ALJ further found that pursuant  
19 to Public Law 104-121, this impairment could not be considered in  
20 determining disability.<sup>1</sup> (Id.) The ALJ determined Plaintiff's  
21 allegations regarding his limitations were not totally credible.  
22 He then evaluated Plaintiff's alleged impairments absent drug and  
23 alcohol abuse and concluded Plaintiff had no "severe" impairment  
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25 <sup>1</sup> Public Law 104-121 is codified as 42 U.S.C. § 423  
26 (d)(2)(C), effective March 2, 2004, and states in pertinent part:  
27 "[a]n individual shall not be considered disabled . . . if  
28 alcoholism or drug addiction would . . . be a contributing factor  
material to the Commissioner's determination that the individual  
is disabled."

1 that would preclude performance of his past relevant work. (Id.)  
2 Thus, the ALJ found Plaintiff "not disabled" as defined by the  
3 Social Security Act.

#### 4 VI. ISSUES

5 The question presented is whether the ALJ's decision is  
6 supported by substantial evidence and is free of legal error.  
7 Specifically, Plaintiff contends the ALJ erred when he: (1) did  
8 not give proper weight to treating providers' opinions; (2) found  
9 Plaintiff's substance abuse was a material factor in his  
10 disability; and (3) found his allegations not totally credible.  
11 (Ct. Rec. 13 at 9).

#### 12 VII. DISCUSSION

##### 13 A. Drug and Alcohol Addiction

14 Plaintiff argues the ALJ erred when he failed to conduct a  
15 "differentiating" analysis as required by the regulations,  
16 specifically 20 C.F.R. § 404.1535. (Ct. Rec. 13 at 12).

17 The Social Security Act bars payment of benefits when drug  
18 addiction and/or alcoholism (DAA) is a contributing factor  
19 material to a disability claim. 42 U.S.C. §§ 423(d)(2)(C),  
20 1382(a)(3)(J); *Sousa v. Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir.  
21 1998). "Material" means that the individual would not be found  
22 disabled if he stopped using drugs and/or alcohol. Plaintiff has  
23 the burden of showing that his DAA is not a contributing material  
24 factor to disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup>  
25 Cir. 2001). If there is evidence of DAA and the individual  
26 succeeds in proving he is disabled, the Commissioner must  
27 determine whether the DAA is material to the determination of  
28 disability. 20 C.F.R. §§ 404.1535, 416.935. If an ALJ finds that

1 the claimant is not disabled, then the claimant is not entitled to  
2 benefits and there is no need to proceed with the analysis to  
3 determine whether DAA is a contributing factor material to  
4 disability. However, if the ALJ finds that the claimant is  
5 disabled and there is medical evidence of drug addiction or  
6 alcoholism, then the ALJ must proceed to determine if the claimant  
7 would be disabled if he stopped using alcohol or drugs.

8 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001).

9 Here, the ALJ found Plaintiff had the "severe" impairment of  
10 polysubstance abuse, which met the Listings, and drug-induced mood  
11 disorders that were severe enough to meet or equal the Listings.

12 (Tr. 28.) He found Plaintiff was disabled, but was precluded from  
13 receiving social security benefits by Public Law 104-121. (Tr.

14 29.) The ALJ then proceeded with the sequential evaluation of  
15 Plaintiff's alleged impairments without DAA and, at step two,

16 found Plaintiff had no "severe" impairments and was not disabled.

17 (Tr. 28.) Specifically, the ALJ found Plaintiff's bipolar  
18 diagnosis was retracted by the examining psychologist who made the  
19 initial diagnosis, and other mood disorders were due to DAA.

20 (Id.) The ALJ found the evidence did not establish clearly that  
21 Plaintiff was clean and sober at any time during the relevant  
22 period. (Id.) He found that the diagnosis of PTSD in the record

23 was incorrect because the Plaintiff lied about serving in Viet

24 Nam, the alleged trigger for his PTSD symptoms. (Id.) The

25 Plaintiff failed to meet his burden of proof at step two; thus,

26 the ALJ did not need to proceed further. *Ball*, 254 F.3d at 822-

27 23; see also 20 C.F.R. §§ 404.1520 (a)(4)(ii) and (c)(if no

28 "severe" impairment found at step two, claimant is found not

1 disabled, and the Commissioner will not consider claimant's age,  
2 education and work experience). The ALJ properly analyzed  
3 Plaintiff's impairments with and without DAA. See *infra* note 4.  
4 Further, the record in its entirety supports the ALJ's  
5 determination that Plaintiff did not have any "severe" impairment  
6 except DAA.

7 B. Medical Opinions

8 Plaintiff argues the ALJ did not give proper weight to the  
9 opinions of his treating providers. He also contends medical  
10 expert Dr. Bostwick's testimony was based on speculation and not  
11 supported by the record. (Ct. Rec. 13 at 9, 13).

12 In social security proceedings, the claimant must prove the  
13 existence of a physical or mental impairment by providing medical  
14 evidence consisting of signs, symptoms, and laboratory findings;  
15 the claimant's own statement of symptoms alone will not suffice.  
16 20 C.F.R. § 416.908. The effects of all symptoms must be  
17 evaluated on the basis of a medically determinable impairment  
18 which can be shown to be the cause of the symptoms. 20 C.F.R. §  
19 416.929. Once medical evidence of an underlying impairment has  
20 been shown, medical findings are not required to support the  
21 alleged severity of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341,  
22 345 (9<sup>th</sup> Cir. 1991). An impairment or combination of impairments  
23 is not "severe" if it does not significantly limit a person's  
24 ability to do basic work activities, such as physical functions,  
25 capacities for seeing, hearing and speaking; understanding,  
26 carrying out and remembering simple instructions, use of judgment;  
27 responding appropriately to supervision, co-workers and usual work  
28 situations; and dealing with changes in a routine work setting.

1 20 C.F.R. § 404.1521.

2 To determine if there is a "severe" impairment, the ALJ must  
3 consider the opinions of Plaintiff's medical providers. A  
4 treating or examining physician's opinion is given more weight  
5 than that of a non-examining physician. *Benecke v. Barnhart*, 379  
6 F.3d 587, 592 (9<sup>th</sup> Cir. 2004); *Holohan v. Massanari*, 246 F.3d  
7 1195, 1202 (9<sup>th</sup> Cir. 2001) (quoting *Reddick v. Chater*, 157 F.3d  
8 715, 725 (9<sup>th</sup> Cir. 1998)); *Smolen v. Chater*, 80 F.3d 1273, 1285-  
9 88 (9<sup>th</sup> Cir. 1996); *Flaten v. Secretary of Health and Human Serv.*,  
10 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995); *Lester v. Chater*, 81 F.3d 821,  
11 830 (9<sup>th</sup> Cir. 1996); *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
12 1989). In addition to medical reports in the record, the analysis  
13 and opinion of a non-examining medical expert selected by an ALJ  
14 may be helpful in his adjudication. *Andrews*, 53 F.3d at 1041  
15 (citing *Magallanes*, 881 F.2d at 753). Testimony of a medical  
16 expert may serve as substantial evidence when supported by other  
17 evidence in the record. *Id.*

18 Here, the ALJ gave a summary of medical records submitted by  
19 examining psychologists Debra Brown, Ph.D., and Frank Rosekrans,  
20 Ph.D. and found that the medical evidence established one clear  
21 diagnosis: poly-substance abuse. (Tr. 28.) This finding is  
22 supported by the record.

23 Dr. Brown evaluated Plaintiff several times between July  
24 2000 and September 2002. (Tr. 190, 194, 198, 202, 210, 214.)  
25 Initially, in 2000, Dr. Brown diagnosed Plaintiff with bipolar  
26 disorder with marked limitations in cognitive and social factors.  
27 (Tr. 192.) Plaintiff relies upon this diagnosis as evidence of  
28 his bipolar disorder. (Ct. Rec. 13 at 12.) However, Dr. Brown

1 retracted this diagnosis when she learned that Plaintiff was an  
2 active drug user. (Tr. 211, 214.) In September, she re-evaluated  
3 Plaintiff with the knowledge that he had been in substance abuse  
4 treatment six times and had relapsed in the prior two months on  
5 methamphetamine and cannabis. (Id.) Dr. Brown stated, "If he was  
6 using meth-amphetamine when I first diagnosed him with BiPolar  
7 disorder [in 2000] it is possible that that diagnosis was not  
8 accurate. Abstinence needs to be confirmed." (Tr. 211, 215.) It  
9 is noted by the court that medical records dated March 13, 2001,  
10 from the Community Health Association of Spokane (CHAS) clinic  
11 indicate Plaintiff was smoking "pot, taking black beauty  
12 [methamphetamine]" and qualified for state funded chemical  
13 dependency treatment. (Tr. 253.) Despite a denial by Plaintiff  
14 on May 15, 2001, of using any chemicals at that time, the UA given  
15 on that date tested positive for cannabis carboxyl. (Tr. 254.)  
16 In June 2001, laboratory results reported positive for  
17 amphetamine, methamphetamine, cannabis, carboxyl-THC. (Tr. 255.)

18 In the September 2002, evaluation, Dr. Brown concluded that  
19 Plaintiff was working nearly half time and "doing relatively  
20 well." She found moderate limitations in his functional ability  
21 to remember and follow complex instruction, learn new tasks and  
22 exercise judgment and make decisions. (Tr. 212.) She found only  
23 mild limitations in his social functions. (Id.) However, due to  
24 his "ongoing substance abuse/dependence and declining cognitive  
25 status," she recommended a protective payee. (Tr. 214.) The ALJ  
26 discussed Dr. Brown's various reports in his decision, and it is  
27 clear he did not reject her most recent, fully informed report;  
28 rather, he relied upon her September 2002, diagnosis and

1 assessment in his final determination of DAA-induced disability.  
2 (Tr. 28, 210-216.) In that assessment, she specifically stated  
3 that after 60 days of abstinence from alcohol or drug use, the  
4 Plaintiff "would be alright." (Tr. 211.) The doctor indicated  
5 she did not believe the Plaintiff was being totally honest about  
6 his alcohol and drug use. (Tr. 212.)

7 Dr. Rosekrans evaluated Plaintiff November 2002, and again in  
8 February 2004. (Tr. 217-29, 640-54.) Plaintiff reported living  
9 in a "crack" house for twelve years and being involved with drugs  
10 for thirty-five years. He admitted that for the five years prior  
11 to his 2002 evaluation, he was injecting crystal meth into his  
12 neck because his arm veins had collapsed. (Tr. 217.) He also  
13 admitted that he had lied about his military service in Viet Nam,  
14 the alleged source of his PTSD. (Id.) After the hearing, but  
15 before the ALJ issued his decision, Dr. Rosekrans evaluated  
16 Plaintiff and administered the Mini-Mental Status Exam (MMSE),  
17 Minnesota Multiphasic Personality Inventory (MMPI-2), Test of  
18 Memory Malingered (TOMM), and the Wechsler Individual Achievement  
19 Test (abbreviated), the results of which were attached to the  
20 psychological evaluation. (Tr. 67, 640-52.) Dr. Rosekrans found  
21 the results were valid, but some low test scores seemed to be due  
22 to poor effort. (Tr. 646.) Although Dr. Rosekrans opined that  
23 Plaintiff had no cognitive deficiencies, that his memory was not  
24 impaired and that the clinical scales in the MMPI-2 test results  
25 did not indicate bipolar disorder, the psychologist stated "he may  
26 or may not be bipolar, but I do not think that it can be diagnosed  
27 from [his] history" due to Plaintiff's "life-time of mood-altering  
28 drugs." (Id.) Dr. Rosekrans diagnosed amphetamine dependence,

1 cannabis dependence, and alcohol abuse, all in early partial  
2 remission. (Tr. 645.) In his Medical Source Statement, he  
3 concluded Plaintiff was "slightly" limited in his (1) ability to  
4 understand, remember and carry out instructions, and (2) ability  
5 to respond appropriately to supervision, co-workers and work  
6 pressures in a work setting. (Tr. 653-54.)

7 Medical expert Allen Bostwick, Ph.D. testified at the hearing  
8 that the bipolar and depressive disorder diagnoses given in other  
9 medical records, e.g. CHAS and YFA, were a "carryover" from Dr.  
10 Brown's misinformed evaluation in July 2000, and Plaintiff's  
11 medications were simply treating symptoms that Plaintiff reported.  
12 <sup>2</sup> (Tr. 675.) Contrary to Plaintiff's argument that Dr. Bostwick's  
13 opinions were based on speculation, Dr. Bostwick had the advantage  
14 of reviewing of all the evidence in making his findings, with the  
15 exception of Dr. Rosekrans' February 2004 report. Dr. Bostwick  
16 opined there was no clinical evidence of bipolar disorder, PTSD or  
17 cognitive disorder. (Tr. 671-72, 675.) He concluded Plaintiff  
18 met the requirements of the Listings under 12.09 (substance  
19 addiction disorder) until sometime in 2000, and afterwards, had a  
20 substance-induced mood disorder under 12.04, which was not  
21 "severe". (Tr. 669-70.) To the extent that the ALJ relied upon  
22 them, the medical expert's opinions are substantially supported by  
23 pre- and post- hearing psychological evaluations from examining  
24 psychologists. (Tr. 28.)

25 In addition to the records summarized by the ALJ, Plaintiff

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26  
27 <sup>2</sup> Dr. Bostwick was unaware of any adverse side effects from  
28 the reported medication other than slowing of reflexes. Plaintiff  
testified he felt no significant side effects. (Tr. 675, 681.)

1 submitted extensive Progress Notes from YFA. His counselor,  
2 Kathleen Armstrong, M.Ed., LMHC, CDP, completed several  
3 psychological evaluation forms. (Tr. 338, 348, 661.) In her  
4 August 2003 evaluation, Ms. Armstrong indicated that even though  
5 Plaintiff had over 60 days of clean time and nine months of  
6 remission, he continued to exhibit bipolar symptoms, for which he  
7 was taking Zyprexa, an anti-psychotic drug.<sup>3</sup> (Tr. 349.) Ms.  
8 Armstrong assessed "severe" limitations in Plaintiff's ability to  
9 exercise judgment and make decisions and respond appropriately to  
10 a normal work setting. She found "marked" limitations in his  
11 ability to understand complex instructions, learn new tasks and  
12 perform routine tasks, as a result of his mental condition. (Tr.  
13 340.) In his letter to the Appeals Council, the Plaintiff  
14 contended the ALJ erred when he failed to discuss Ms. Armstrong's  
15 opinions and give reasons why they were discounted. (Tr. 15.)

16 Ms. Armstrong is a non-medical source. Non-medical sources  
17 are considered "other sources" under the Regulations and include  
18 nurse practitioners, physicians' assistants, therapists, teachers,  
19 social workers, spouses and other non-medical sources. 20 C.F. R.  
20 404.1513(d). Non-medical testimony can never establish a  
21 diagnosis or disability absent corroborating competent medical  
22 evidence. *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996).  
23 However, the ALJ is required to "consider observations by  
24 non-medical sources as to how an impairment affects a claimant's  
25 ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir.

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26 <sup>3</sup> Zyprexa helps manage symptoms of schizophrenia and the  
27 manic phase of bipolar disorder. It's generic name is olanzapine.  
28 *The PDR Family Guide to Prescription Drugs* (2005), available at  
[http://www.pdrhealth.com/drug\\_info/rxdrugprofiles](http://www.pdrhealth.com/drug_info/rxdrugprofiles).

1 1987). Pursuant to *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th  
2 Cir. 1993), an ALJ is obligated to give reasons germane to "other  
3 source" testimony before discounting it.

4 Although the ALJ stated that Plaintiff was in treatment with  
5 YFA, he did not discuss in detail or specifically discount Ms.  
6 Armstrong's opinions regarding Plaintiff's functional limitations.  
7 (Tr. 28.) However, the ALJ's failure to thoroughly discuss these  
8 opinions is harmless error. An error is harmless when the  
9 correction of that error would not alter the result. See *Johnson*  
10 *v. Shalala*, 60 F.3d 1428, 1436 n. 9 (9<sup>th</sup> Cir. 1995). Further, an  
11 ALJ's decision will not be reversed for errors that are harmless.  
12 *Burch v. Barnhart*, 400 F.3d 676, 679 (9<sup>th</sup> Cir. 2005)(citing *Curry*  
13 *v. Sullivan*, 925 F.2d 1127, 1131 (9<sup>th</sup> Cir. 1991).

14 Contrary to Plaintiff's claim, there was no need for the ALJ  
15 to discount or reject Ms. Armstrong's opinions. Her assessment of  
16 Plaintiff's "severe" and "marked" limitations while he was in DAA  
17 treatment is consistent with and supports the ALJ's finding of  
18 disability due to DAA. (Tr. 28.) Remand simply for a discussion  
19 of her reports and evaluation would not change the ALJ's  
20 determination. When the ALJ factored out the DAA, he found no  
21 medically established "severe" mental impairment; thus, further  
22 evaluation of Plaintiff's functional limitations was not  
23 necessary. *Ball*, 254 F.3d at 823 (ALJ is not required to proceed  
24 past step two of the sequential evaluation if no "severe"  
25 impairment found absent DAA). The record in its entirety  
26 reasonably supports the ALJ's finding that there is no competent  
27 medical evidence to support a diagnosis of bipolar disorder, PTSD  
28 or other mental condition that is not DAA induced. Dr. Rosekrans,

1 Dr. Brown and Dr. Bostwick, as acceptable medical sources, all  
2 opined Plaintiff's clear diagnosis was substance abuse and any  
3 restrictions on Plaintiff's ability to work were caused by this  
4 abuse.<sup>4</sup> (Tr. 28, 211, 215, 219, 645, 669-70.) Ms. Armstrong's  
5 non-medical opinions regarding diagnoses or impairment are not  
6 considered by the Commissioner. 20 C.F.R. § 404.1513(a).

7 C. Credibility

8 Plaintiff argues the ALJ's credibility finding is not  
9 supported by convincing evidence, and therefore, his testimony  
10 regarding his inability to work should be credited. (Ct. Rec. 13  
11 at 14). This argument is without merit. The court has held that  
12 when the ALJ finds the claimant's testimony as to impairments and  
13 symptoms is unreliable, the ALJ must make a credibility  
14 determination with findings sufficiently specific to permit the  
15 court to conclude the ALJ did not arbitrarily discredit claimant's  
16 testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir.

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18 <sup>4</sup> Dr. Rosekrans also opined that due to Plaintiff's history  
19 of DAA, it would take years of abstinence before non drug-induced  
20 mood disorders could be assessed. (Tr. 646.) Dr. Brown, upon  
21 learning of Plaintiff's DAA history, likewise opined that  
22 abstinence needed to be confirmed prior to further  
23 neuropsychological assessment. (Tr. 205.) Although Plaintiff  
24 apparently reported abstinence to Ms. Armstrong (Tr. 495, 663), no  
25 clinical documentation was submitted to verify sobriety for an  
26 extended period of time. Nor does Plaintiff argue that he has  
27 established a significant period of sobriety. In fact, as noted  
28 by the ALJ, Plaintiff reported continued substance abuse through  
2003. (Tr. 28, 276, 615, 642.) The ALJ properly found  
Plaintiff's reported sobriety did not last for more than two to  
three months at a time. (Tr. 28.) Thus, there was no period of  
confirmed abstinence in which to assess Plaintiff's mental  
condition without the effects of DAA. Plaintiff did not meet his  
burden of proving DAA was not a contributing factor material to  
his disability. *Ball*, 254 F.3d at 823.

1 2002); see also *Bunnell*, 947 F.2d at 345-46. In determining  
2 credibility, the ALJ may consider, among other things, a  
3 claimant's reputation for truthfulness and inconsistencies between  
4 his testimony and conduct. *Light v. Soc. Sec. Admin.*, 119 F.3d  
5 789, 792 (9th Cir. 1997). If the ALJ's credibility finding is  
6 supported by substantial evidence in the record, the court may not  
7 engage in second-guessing. See *Morgan*, 169 F.3d at 595.

8 Here, Plaintiff testified that he could not sustain work due  
9 to his weight, his left eye, sleep disturbance and "problems with  
10 his bipolar condition." (Tr. 680-81.) As discussed above, there  
11 is no medical evidence to support his allegations of bipolar  
12 disorder. Further, the ALJ specifically found that Plaintiff lied  
13 to Dr. Brown about his drug use, failed to tell Dr. Brown that he  
14 was in drug treatment, and admitted lying about serving in Viet  
15 Nam to his providers. The ALJ cited Plaintiff's report to Dr.  
16 Rosekrans in November 2002, in which that he stated he lied  
17 because "it gave him a sense of belonging." (Tr. 217.) Progress  
18 notes from YFA indicate Plaintiff was discussing his PTSD  
19 flashbacks and "being a POW and what it was like for him" as  
20 recently as July and August 2002. (Tr. 401, 415.) Further, in  
21 his summary of the medical evidence, the ALJ cited the  
22 observations of Dr. Rosekrans and Dr. Brown concerning Plaintiff's  
23 failure to tell the truth about his drug use. (Tr. 28.) These  
24 are clear and convincing examples of Plaintiff's lack of  
25 credibility, which are supported by the record. The ALJ did not  
26 err in his credibility finding.

#### 27 **VIII. CONCLUSION**

28 Plaintiff has failed to present evidence of a "severe"

1 impairment other than those caused by DAA. The ALJ properly found  
2 Plaintiff disabled due to his DAA, and under a second  
3 "differentiating" sequential evaluation factoring out the DAA,  
4 found no medical evidence of a "severe" impairment at step two to  
5 support a finding of disability. His finding is supported by the  
6 acceptable medical sources in the record. The ALJ was not  
7 required to proceed to step four or five, thus any claimed error  
8 regarding his hypothetical question to the vocational expert is  
9 moot. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is  
12 **DENIED.**

13 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 15**) is  
14 **GRANTED.**

15 3. Judgment for the **Defendant** shall be entered. The District  
16 Court Executive is directed to enter this Order, forward copies to  
17 counsel, and close this file.

18 **DATED** this 6<sup>th</sup> day of March, 2006.

19  
20 s/ Alan A. McDonald  
21 ALAN A. McDONALD  
22 SENIOR UNITED STATES DISTRICT JUDGE  
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